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IN THE SUPREME COURT OF THE UNITED STATES

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IDAHO, :
Petitioner :
v. : No. 00-189
UNITED STATES, ET AL. :
- - - - - X

Washington, D.C.
Monday, April 23, 2001

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:04 a.m.

APPEARANCES:

STEVEN W. STRACK, ESQ., Deputy Attorney General,
Boise, Idaho; on behalf of the petitioner.
RAYMOND C. GIVENS, ESQ., Coeur d'Alene, Idaho;
on behalf of Respondent Coeur d'Alene Tribe.
DAVID C. FREDERICK, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington,
D.C.; on behalf of Respondent United States.

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3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 00-189, Idaho versus the United States. Mr.
5 Strack.

6 ORAL ARGUMENT OF STEVEN W. STRACK, ESQ.

7 ON BEHALF OF THE PETITIONER

8 MR. STRACK: Mr. Chief Justice, and may it
9 please the Court:

10 Four years ago in a decision that involved these
11 same parties, the court affirmed the principal that
12 submerged lands are an essential attribute of state
13 sovereignty. Today the court is asked to determine
14 whether this essential attribute of sovereignty was
15 defeated by the Act of March 2nd, 1889, an Act that
16 authorized negotiations for the purchase of timber and
17 mineral lands. Under law, the 1889 Act embodies a
18 presumption against defeat of state title.

19 QUESTION: Would you mind if I just get a little
20 background that helps me understand better the practical
21 issues involved here. We're talking about roughly
22 one-third of the lake, the submerged lands and about
23 one-third of Lake Coeur d'Alene; is that right?

24 MR. STRACK: Actually the acreage would be more
25 like one-fourth of the lake.

1 QUESTION: About one-fourth.

2 MR. STRACK: Yes.

3 QUESTION: In the southern part of the lake?

4 MR. STRACK: This is the southern part of Lake
5 Coeur d'Alene and we're also talking about the lower 15 or
6 20 miles of the St. Joe River.

7 QUESTION: And what are the practical
8 consequences of a finding one way or the other? What as a
9 practical matter difference does it make who has the
10 submerged lands.

11 MR. STRACK: Well, I think it makes a very large
12 difference from the state's viewpoint, Justice O'Connor,
13 because this is a public highway. This is not just an
14 isolated body of water.

15 QUESTION: Well, just tell me what's involved.
16 Is it fishing rights or regulation of boating, what is it?
17 Why does the state care, what is involved as a practical
18 matter.

19 MR. STRACK: We care because the majority of the
20 users on the Lake are not Indians and because of that we
21 have a significant interest in protecting their safety,
22 for example, citing people who are boarding in an unsafe
23 manner or if citing someone who doesn't have the requisite
24 amount of life vests on board for small children. It's
25 not clear the tribe could fill that role --

1 QUESTION: I'll pursue Justice O'Connor's
2 question, why can't the State, why can't the tribe have
3 the patrol boat just like a tribe has a patrol car on the
4 road?

5 MR. STRACK: Because this is a public highway
6 and the court has been very clear that on a public highway
7 tribes usually do not have general sovereign authority
8 over non-Indians. That's because they don't have the
9 power to exclude generally and that's the basis of tribal
10 authority over non-Indians, in most instances.

11 QUESTION: Well, then, why can't the state's
12 boat go into the southern part of the lake?

13 MR. STRACK: Because the tribe has basically
14 precluded us from that and I believe the Court's decree
15 precludes us from doing that also.

16 QUESTION: You can't work -- all this is about
17 is whether or not the State wants to have a policeman in a
18 boat cite somebody for not wearing a life vest and the
19 tribe just won't agree to figuring out some method so that
20 people boat safely? It sounds like is that all that's at
21 stake and you can't work it out with the tribe?

22 MR. STRACK: Justice Breyer, I think there's a
23 lot more at stake than simply that.

24 QUESTION: I'm not saying in principle. I want
25 to know what does this come down to as a practical matter

1 that has led the State of Idaho to say it's important. I
2 mean all kinds of principles, you may even be right, they
3 may be right, but sometimes -- what is the practical
4 application, anything else?

5 MR. STRACK: I think there's many practical
6 applications, Justice Breyer, as we spoke about in our
7 brief.

8 QUESTION: Well, name one. Could you just name
9 one. So far I have the fact that you told Justice
10 O'Connor that it's not been possible for you to work out
11 with the tribe whether a policeman could cite somebody in
12 a boat for not wearing a life jacket. Now what's the next
13 one?

14 MR. STRACK: Oh, for example, we have an
15 in-stream flow, a statutory in-stream flow that protects
16 the lake level and that's certainly broadened the question
17 by this concept of tribal ownership of at least a portion
18 of the lake. We have --

19 QUESTION: Mr. Strack, may I ask that you raise
20 the podium a bit because I'm having difficulty hearing.

21 QUESTION: You're lowering. Other way.

22 QUESTION: There.

23 MR. STRACK: Another practical aspect would be,
24 for example, our statute that prevents dredging on this
25 portion of the river. That would no longer have any

1 validity because now it's tribal land. And so generally
2 this, we treat this lake as a public resource and a
3 recreation place. The State protects public access and
4 because it is a public resource, the public, if we fail in
5 our duties the public can sue us. That wouldn't
6 necessarily be true of the tribe on the lake because then
7 it becomes managed not for public uses necessary but for
8 whatever use --

9 QUESTION: Well, does the Federal Government in
10 its capacity as a trustee, if you will, have any role in
11 how the lake is managed or used if it belongs to the
12 tribe?

13 MR. STRACK: Justice O'Connor I haven't seen any
14 evidence of that to date. They have simply stepped back
15 and let the tribe regulate. I haven't seen any evidence
16 of the Federal Government having any interest in doing
17 that.

18 QUESTION: Let me ask you another question.
19 After Idaho became a state, I think there were at least
20 two conveyances by the United States to people of land in
21 that area, one to Frederick Post and the other to someone
22 named Harrison; is that right?

23 MR. STRACK: Justice O'Connor, actually the
24 Harrison session was not a conveyance of land, they simply
25 bought land from the tribe.

1 QUESTION: Ceded.

2 MR. STRACK: Got a cession of land from the
3 tribe but they never exercised any ownership right over
4 that little corner of the lake. That was part of that
5 Harrison cession. They never conveyed it to anybody.

6 QUESTION: And how about Post the Frederick Post
7 property.

8 MR. STRACK: The Post cession occurred in the
9 1880 -- 1891 Act.

10 QUESTION: So is it your position that both of
11 those are void, that there was no authority because Idaho
12 had already become a state.

13 MR. STRACK: First of all, on the Harrison
14 cession, I don't think that would be void because they
15 were simply changing the boundary across a navigable
16 waterway. They could do that today if they wanted to and
17 we would have no problem with that if they wanted to take
18 a portion of the lake out of reservation. We would have a
19 problem if they attempted to convey it to somebody, but
20 they didn't do that in --

21 QUESTION: But if the tribe doesn't own it, I
22 don't see how you could take the position that the
23 conveyance by them would be valid. I don't understand.

24 MR. STRACK: It's a simple cession. I think the
25 tribe could agree that we're going to cede this portion of

1 the lake out of the reservation.

2 QUESTION: Something they don't own.

3 MR. STRACK: Yes. I think it's a jurisdictional
4 boundary, not just a property boundary so they can
5 certainly say yes, we'll agree to moving this
6 jurisdictional boundary over to this part of the lake, and
7 I don't think that would have any violation of the state's
8 rights under the equal footing doctrine.

9 QUESTION: You're making a distinction between
10 property and regulation and I gather from your answers so
11 far what you're saying is property rights are not at
12 stake, only sovereign rights to police, is that accurate?

13 MR. STRACK: Well, Justice Ginsburg, the way I
14 view submerged lands is that they're a blend of sovereign
15 rights and property rights, and so -- but there is
16 examples where if there is a conveyance of property and a
17 conveyance of sovereignty, the submerged lands go with the
18 sovereignty because they're an attribute of sovereignty.
19 It's a very loose situation. But what I was talk --
20 referring to before was the fact that reservation
21 boundaries are not just property boundaries, they're also
22 jurisdictional boundaries, especially nowadays where we
23 have allotted reservations such as this one, and so they
24 can move the reservation boundary without necessarily
25 applying anything as to property rights on either side of

1 that --

2 QUESTION: What about as to sovereignty rights?
3 When you say jurisdictional boundary, I assume you mean a
4 boundary of sovereignty. You don't mean that?

5 MR. STRACK: Justice Scalia, yes, I do mean a
6 boundary of sovereignty.

7 QUESTION: You do mean that. Well, then, that
8 brings back the question of how the tribe could cede
9 jurisdictional rights without ceding sovereign rights.

10 MR. STRACK: I think in the case of the Harrison
11 cession, Justice Scalia, again there was no exercise of
12 property rights once that cession occurred but --

13 QUESTION: But we're not talking about property
14 rights. We're talking about sovereignty rights, aren't
15 we?

16 MR. STRACK: That's correct.

17 QUESTION: And you acknowledge that the
18 consequence of the cession was an alteration of
19 jurisdiction, which I assume is the same as an alteration
20 of sovereignty.

21 MR. STRACK: Justice Scalia, I think I see the
22 source of your confusion and perhaps I could clear that up
23 a bit.

24 QUESTION: I hope so.

25 MR. STRACK: And the fact is that within an

1 Indian reservation there is a shared sovereignty. State
2 sovereignty extends over jurisdictions, but so does
3 federal sovereignty, and so a jurisdictional line as I'm
4 speaking of it here would be a line wherein in this would
5 define Indian country in which the Federal Government
6 would have perhaps special preemptive powers over State
7 sovereignty. We don't view this as an either/or situation
8 where you either have State sovereignty or you have
9 Federal sovereignty. There's always going to be shared
10 sovereignty within Indian country, and as a matter of fact
11 here, there's numerous examples of this kind of shared
12 sovereignty or special beneficial rights that tribes own
13 in sovereign lands without defeating State title.

14 I think a wonderful example is the usual and
15 accustomed fishing right that many tribes have in the
16 Northwest and there they have the right to fish at these
17 places, occupy these places, it's a special right in
18 submerged lands but it does not defeat State sovereignty
19 over those lands. And so certainly there's a number of
20 examples where we have this beneficial interest in a tribe
21 that does not necessarily imply anything as far as a
22 State's sovereign right to regulate itself.

23 QUESTION: It also doesn't apply anything as to
24 the tribal sovereignty. I mean that's the source of my
25 confusion. You don't think that sovereignty is at issue

1 when there are just the fishing rights involved, correct?

2 MR. STRACK: I think that would be correct,
3 Justice Scalia.

4 QUESTION: You get to the 1899 Act, as I
5 understand it the premise of the 1899 Act was that the
6 United States would not take any portion of the
7 reservation except by agreement; is that correct.

8 MR. STRACK: They would not take the portion
9 that they were authorized to purchase except by agreement
10 and that would have been the timber and mineral lands,
11 yes.

12 QUESTION: Well, and are you saying that the --
13 that the Act had no significance for any other portion of
14 the reservation?

15 MR. STRACK: In terms of submerged lands, I
16 think, Justice Souter, that is what we are submitting,
17 that this was an act that sought diminishment of the
18 reservation and Congress knew that it would be focused on
19 the northern part of the reservation and they knew that
20 the northern part of the reservation contained submerged
21 lands. That was all contained in the 1888 report to
22 Congress. But, in seeking that diminishment, they did not
23 authorize the purchase of submerged lands, so how could
24 they seek diminishment --

25 QUESTION: Do we know, is that true as a matter

1 of law, I mean couldn't submerged lands also have mineral
2 deposits or have been thought to have mineral deposits and
3 therefore be subject to the purchase power under the
4 statute?

5 MR. STRACK: There's no evidence at all in the
6 record, Justice Souter, that Congress believed these
7 submerged lands to have any mineral value whatsoever.

8 QUESTION: Well, let's assume then that the --
9 that the Act referred only to lands that were not
10 submerged lands. Wouldn't it have been very -- a very
11 strange construction on the intentions and the acts of the
12 United States to assume on the one hand that with respect
13 to specified kinds of lands, timber and minerals, it
14 wouldn't touch the reservation except by agreement, and at
15 the same time assume that without any agreement and in
16 fact without any express reference, it was divesting the
17 tribe of the submerged lands which were also part of the
18 reservation. Wouldn't that have been -- I mean wouldn't
19 anyone looking at the Act say gee, if they're not going to
20 take timber and minerals except by agreement they're not
21 going to take anything else either. Apparently the only
22 thing they intend to take, if they can get an agreement,
23 is timber and minerals. They don't intend to take
24 anything else and we may safely assume that they won't
25 except by agreement. Wouldn't that be a fair

1 interpretation of the significance of the 1899 Act.

2 QUESTION: 1889.

3 QUESTION: -- '89 Act.

4 MR. STRACK: Justice Souter, I think we would
5 disagree for the fact that I -- in fact, it would be
6 strange if we believed that the tribe had owned these
7 lands prior to the 1889 Act.

8 QUESTION: Well, I thought it was -- I thought
9 it was conceded in this case that the reservation included
10 -- the reservation as originally set aside by executive
11 order included submerged lands.

12 MR. STRACK: We conceded the fact, Justice
13 Souter, that the President intended to reserve those
14 submerged lands but we made that concession in light of
15 the trial court's finding that the President was not
16 authorized to permanently reserve those lands.

17 QUESTION: Well, but he wasn't authorized
18 permanently to reserve anything, I presume, was he? The
19 submerged lands are in the same position as any other
20 portion of the reservation, isn't that so?

21 MR. STRACK: No, I think I would disagree with
22 that, Justice Souter, because I think submerged lands are
23 in a special status. Certainly the President has the
24 authority to set aside lands, prevent settlement on those
25 lands, but submerged lands usually are not public lands in

1 that sense.

2 QUESTION: What about heavenly authority?

3 QUESTION: I don't see then why you made the
4 concession.

5 MR. STRACK: We made the concession that he
6 intended to reserve the submerged lands because that was
7 basically a factual finding and we did not view it
8 significant in light of the fact that you would have to
9 have the subsequent congressional ratification and we
10 wanted to focus the Court of Appeals on this second
11 element of the Alaska test which is the need for
12 ratification.

13 QUESTION: Okay, but before you get to the
14 second element I just want to get clear on the terms that
15 are being used. You conceded that the President intended
16 to include submerged lands in the reservation and I take
17 it you don't dispute the fact that the commissioner had by
18 this time filed a -- a report saying that submerged lands
19 were included in the reservation. Isn't it therefore fair
20 to assume that when Congress was talking about the
21 reservation in the 1889 Act, that it was talking about the
22 reservation as so understood, i.e., the reservation as the
23 President intended to create it and as the commissioner
24 had described it to include submerged lands.

25 MR. STRACK: Justice Souter, we certainly

1 recognize that Congress was looking at the reservation
2 boundaries as established and working on the basis of the
3 information that was provided in the 1888 report. But we
4 would agree with that, but we would question whether or
5 not Congress actually approved that inclusion because of
6 this omission of submerged lands.

7 QUESTION: Well, I'm just asking right now what
8 Congress meant when it was talking about the reservation
9 in the 1889 Act, and isn't it reasonable to suppose that
10 it meant by reservation the reservation as intended, the
11 reservation as described by the commissioner, i.e., the
12 reservation that included submerged lands. Isn't that
13 probably what it meant by the word?

14 MR. STRACK: Looking at the 1889 Act as a whole,
15 Justice Souter, I don't think I would agree that statement
16 because of this omission of the submerged lands to my mind
17 raises a question as to whether Congress recognized that
18 inclusion. And if we look back at the 1888 report, it
19 does not mention submerged lands per se. It does not
20 mention of bed of the lake. It mentions the fact that the
21 reservation embraces these navigable waters.

22 QUESTION: Why do you have to take that
23 position? I mean, can't you acknowledge that when
24 Congress was speaking about the reservation it was talking
25 about the reservation that President Grant had created,

1 but that Congress knew that that reservation was not
2 legally effective to create it because it needed
3 ratification which had not occurred.

4 But nevertheless Congress, out of an abundance
5 of goodwill to the Indians, was not willing to go back on
6 the 1873 executive order without the express consent of
7 the Indians, but that still doesn't amount to any
8 effective action by Congress creating the reservation.

9 I mean, your basic point is that the 1873
10 executive order doesn't do anything without Congressional
11 ratification, which never occurred. So does it make any
12 difference whether Congress in the 1889 Act viewed the
13 1873 order which it knew was ineffective absent
14 ratification as including the submerged lands or not?
15 What difference does it make?

16 MR. STRACK: Justice Scalia, I don't think it
17 makes any difference. I think you're correct in that
18 assumption.

19 QUESTION: Might it not make a difference in
20 what Congress thought it was doing when it was in fact
21 passing the Statehood Act which referred to reservations
22 of the -- reservation of the Indian reservation? Might
23 that not inform us in what Congress had in mind?

24 MR. STRACK: Justice Souter, when I say it
25 doesn't make a difference I'm referring to the second

1 prong of the Alaska test. Under that prong you would
2 still have to have this affirmative declaration of intent.

3 QUESTION: Well, we do because in Alaska we're
4 dealing with. In effect, a two-party situation. We're
5 dealing with the relationship between the national
6 government and the new State. Here we're dealing with a
7 three party situation and one of the things I would think
8 that would be an indication of what Congress meant in
9 dealing with the State was what Congress understood in its
10 dealings with the Indians.

11 MR. STRACK: Your Honor, I would agree with that
12 but I think an essential background fact that perhaps
13 we're not taking into account is the fact that executive
14 orders at this point were not thought to convey any
15 property interest to tribes.

16 QUESTION: Mr. Strack, did the Court of Appeals
17 in its opinion place any reliance on the Statehood Act?
18 As I read it, it didn't, did it?

19 MR. STRACK: Your Honor, it mentioned the
20 Statehood Act but it did not rely on it for a finding that
21 State title had been defeated, that's correct.

22 QUESTION: Mr. Strack, do I understand your
23 position correctly that it's the 1889 agreement, the
24 ratification of that, if that had come nine months
25 earlier, if that had come before statehood instead of

1 after you would concede that the tribe, United States in
2 trust for the tribe, should prevail. Is that what this
3 whole thing turns on, that it was nine months after rather
4 than before?

5 MR. STRACK: Justice Ginsburg, I don't think we
6 would agree with that because if the 1891 Act had in fact
7 been enacted before statehood, then we would have to look
8 at this under the conveyance rules of Holt State Bank and
9 Montana, and there the court said that where a tribe is
10 simply granted a continuing right of aboriginal occupation
11 that that right usually would not carry with it title to
12 submerged lands. It may have an interest in submerged
13 lands, but not sufficient to defeat State title.

14 And here, all of the rights vested in the tribe
15 came as a result of the 1887 agreement which provided that
16 these lands would be held as Indian land which is simply a
17 restatement of this principle of aboriginal occupation.
18 There was no additional rights vested in the tribe as the
19 result of the 1889 agreement.

20 QUESTION: I'm getting confused. You said a
21 moment ago the 1887 agreement, did you misstate that or
22 are there two agreements, one 1887 and one 1889?

23 MR. STRACK: Mr. Chief Justice, there is two
24 agreements here. Maybe I could walk through it.

25 QUESTION: Tell us what they are and what the

1 difference is.

2 MR. STRACK: In 1887, the tribe and the United
3 States negotiated an agreement that would cede all lands
4 outside the 1873 boundaries and as part of that agreement
5 they agreed that the tribe would continue to hold the land
6 within the reservation as Indian land.

7 Then in 1889 we have the second agreement which
8 was only a cession agreement specifically limited to
9 purchase of lands by the 1889 Act and in the agreement
10 there was no additional rights of conveyance. There's no
11 language of conveyance in the 1889 agreement itself. It's
12 simply a quit claim to the northern portion of the
13 reservation.

14 So whatever rights the tribe holds in the
15 southern third of the lake and the remainder of the
16 reservation are necessarily going to be founded in the
17 language of the 1887 Act which defines the tribe's rights.
18 And under Montana, where we simply have a continued right
19 of aboriginal occupation, that type of conveyance to a
20 tribe would not normally carry with it an interest in a
21 lake bed that would be sufficient to defeat State title.

22 QUESTION: If it says in this kind of grant,
23 suppose it said specifically we're going to give to the
24 Indian tribe and not to Idaho the right to use navigable
25 waters on the lake would that be sufficient to carry with

1 it submerged lands?

2 MR. STRACK: Justice Breyer, I would say it
3 would not because again that would simply be a beneficial
4 interest and we have numerous examples of where tribes
5 have beneficial interest in submerged lands without a
6 defeat of State title. For example, they could reserve an
7 exclusive fishing right. They could reserve a fishing
8 right in common with other people.

9 But I think the point I want to make is that
10 because of this presumption against defeat of State title
11 that we should always assume that Congress would try to
12 accommodate tribal rights and State interest in public
13 ownership of these lands to the extent possible. And here
14 where all we have is a simple right of use, that would
15 probably not be sufficient. Again, I think it's worth
16 pointing out that in neither of these agreements is there
17 a fishing right provided to the tribe expressly, which is
18 very unusual for a northwestern tribe.

19 I think that admission by itself is very telling
20 in the legislative history leading up to the 1889 Act and
21 the 1889 agreement, again we see numerous references to
22 this tribe as a farming tribe, not as a fishing tribe.

23 QUESTION: So what would it have taken, if the
24 1873 reservation had been ratified, would that have done
25 it, would there then be no dispute? I'm trying to

1 determine what it is in the State's view that would have
2 plainly conferred this submerged land right on the tribe.

3 MR. STRACK: Justice Ginsburg, I think it would
4 take something akin to section 6 C which was reviewed in
5 the Alaska case which would be reratified as reservation
6 and prevent any passage of lands to the future State of
7 Idaho.

8 QUESTION: So ratifying the 1873 reservation
9 executive order, that would not have been sufficient
10 either?

11 MR. STRACK: I don't believe it would be a
12 ratification just by itself because the courts always look
13 for that additional affirmative language somehow, like in
14 the Choctaw case where you have fee title but it was
15 suggested that even that fee title might not be sufficient
16 because the court then relied on that passage which said
17 no part of this reservation shall ever be part of any
18 future State. And again, we see that in the Alaska case,
19 none of these lands will ever be passed to the future
20 State.

21 QUESTION: And that position explains why you
22 were willing to leave uncontested any of the fact findings
23 and said the only question is what did Congress do. You
24 didn't question what the executive meant or any of the
25 fact findings but only what Congress did or didn't do.

22

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1 MR. STRACK: Your Honor, that's correct.

2 QUESTION: In terms of what Congress set to do,
3 should it make a difference whether we're talking about a
4 reservation which on the one hand has simply been set
5 aside by executive or Congressional action to which
6 Indians were moved as in the Cherokees and so on or
7 whether we're talking about a reservation which in fact
8 covers land to which the Indians have an aboriginal title
9 or an aboriginal claim which I take it is the case here.

10 MR. STRACK: Justice Souter, I believe the
11 distinction the court has made in the past is between an
12 affirmative grant of rights and a continuing aboriginal
13 occupation of rights. I don't know that it would make a
14 difference if the tribe had not aboriginally occupied the
15 territory or not. Certainly what it looks for is that
16 affirmative grant in that language which says that no
17 party's land shall ever pass to the future State. I'd
18 like to reserve the remainder of my time.

19 QUESTION: Very well Mr. Strack. Mr. Givens,
20 we'll hear from you.

21 ORAL ARGUMENT OF RAYMOND C. GIVENS, ESQ.

22 ON BEHALF OF THE RESPONDENT COEUR D'ALENE TRIBE

23 MR. GIVENS: Mr. Chief Justice, may it please
24 the court:

25 There are six prestatehood acts of Congress or

1 items that occurred that Congress was specifically
2 informed of that establish that the State title to these
3 submerged lands was defeated at statehood.

4 QUESTION: When you say, Mr. Givens, that
5 Congress was specifically informed of, I gather you're not
6 suggesting that Congress took any action in response to
7 them.

8 MR. GIVENS: Oh, yes they did.

9 QUESTION: Okay, well then, are these Acts of
10 Congress you're talking about.

11 MR. GIVENS: Some are and some are information
12 provided to Congress that form the basis for those
13 Congressional Acts, Your Honor. Let me run through them
14 briefly. I think --

15 QUESTION: Well, do that, please.

16 MR. GIVENS: -- it will become clear. The first
17 is the 1873 agreement, executive order, and the reports of
18 that. The executive order, of course, established the
19 reservation, withdrew it and set it apart, set the
20 boundaries and the reports provided that information to
21 Congress. So Congress knew about it from the beginning.

22 QUESTION: Well, you know, of what significance
23 is the, quote, the language, quote, Congress, quote, knew
24 about it from the beginning. Are you suggesting that every
25 member of Congress read these reports?

1 MR. GIVENS: Your Honor, Congress as an
2 institution had knowledge of the reservation and the
3 specific --

4 QUESTION: Well, what is your authority for
5 saying that it is crucial whether or not Congress had
6 notice.

7 MR. GIVENS: Because in --

8 QUESTION: Your case authority.

9 MR. GIVENS: Well, what is important, Your
10 Honor, is that in the later acts Congress by statute
11 specifically referred to three times before statehood
12 either the Coeur d'Alene reservation, the present Coeur
13 d'Alene reservation or talking about the tribe and its
14 reservation, so Congress knew of the reservation and they
15 knew of it because of the second one Your Honor, and that
16 was the 1883 survey and plat of the reservation which is
17 at page 49 of the record.

18 QUESTION: And how did Congress know of that
19 survey?

20 MR. GIVENS: They knew of it, Your Honor,
21 because of the third one and the third one is in 1888 the
22 Senate made specific requests of the Department of
23 Interior concerning the reservation asking is the lake in
24 the reservation, and if so, should we get any of it back,
25 and they were provided, the Department of Interior

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1 provided Congress with that same plat that showed the
2 detail of the lake.

3 QUESTION: Was this a joint resolution of the
4 Senate?

5 MR. GIVENS: It was only of the Senate, it was
6 not of the House, but prestatehood the record also
7 establishes, Your Honor, in the March 1890 House report
8 that the House also had knowledge of that and the House
9 March report makes that clear.

10 QUESTION: Well, you say the House report showed
11 that the House had not -- was this a report of the full
12 House or of a committee of the House.

13 MR. GIVENS: This was a report of the Committee
14 on Indian Affairs of the House, Your Honor.

15 QUESTION: On that specifically, that's why I
16 asked the question, I think Mr. Strack said, well, the
17 1887 is it, the question that they put in 1888 was does it
18 include any portion of the navigable waters of the lake
19 and then it comes back it does include all the navigable
20 waters. But he said the navigable waters has nothing to
21 do with the submerged land, that it's, maybe they gave him
22 the navigable waters but that's not the submerged land
23 underneath the navigable waters. I think that was his
24 answer.

25 I'd like you to respond to that because all the

1 documents you rely upon refer to navigable waters, as none
2 of them says anything about submerged land.

3 MR. GIVENS: In spending ten years with these
4 documents, there can be really no dispute that whether
5 it's called navigable waters or submerged lands or lake
6 just like it's called land or ground or soil the meaning
7 of the -- was the same throughout.

8 QUESTION: I haven't spent ten years with them
9 so -- so I mean, and they're arguing the opposite --

10 MR. GIVENS: Yeah.

11 QUESTION: And therefore I'd like to know what
12 specifically it is that allows me to say that those words
13 navigable waters includes submerged lands.

14 MR. GIVENS: It is this, Your Honor, and that's
15 why this survey and plat is so important in that the -- in
16 the sur -- in the plat, in the survey they calculated the
17 actual acreage and in 1888 the Department of Interior did
18 an interesting thing. Not only did they provide Congress
19 with the plat, they provided Cong -- or the Senate with
20 another map that showed the acreage and actually the
21 acreage is right over the top of the lake and this is at
22 135 of the record, and Coeur d'Alene reservation is
23 written right through the lake and in the text that they
24 talk about of that '88 question and answer which is the
25 third of these items, they use the word embrace both for

1 the acreage and for the navigable waters.

2 QUESTION: Mr. Givens, I don't think there's a
3 big dispute about the extent of the reservation. I mean
4 that isn't really what the dispute's about. The dispute
5 is whether, when you describe the boundaries of the
6 reservation, it means that the Indians have aboriginal
7 occupation rights or whether it means the extraordinary
8 thing that when we create a new State, the land under
9 navigable waters will not go to the new State, and how do
10 you get that out of simply the description of the
11 boundaries of the reservation?

12 MR. GIVENS: You get to that through the next
13 three items, Your Honor, and they are the '89 statute
14 where it talked about its reservation and they knew that
15 reservation included the lake because of the detail in the
16 plat. They --

17 QUESTION: How do we know that it included the
18 submerged lands as opposed to the surface of the lake. I
19 mean, we describe water area in acreage just as well as
20 land area, so how do you get from acreage necessarily
21 submerged land?

22 MR. GIVENS: We know that because of the next
23 item, Your Honor, and that was the two reports in 1890,
24 and particularly the first one from the commissioner that
25 said that the United States got back most of the lake but

1 specifically the executive specific report on these
2 negotiations that included a map again, a second map
3 showing the reservation boundary dotted line crossing the
4 lake showing that these submerged lands were part of the
5 -- more particularly --

6 QUESTION: Well, now, I don't see that it shows
7 that at all because as I understand it, that map was there
8 at the time of the negotiations between General Simpson
9 and a tribal chief whose name I forget and General Simpson
10 started out with the proposition in those negotiations
11 that in fact both the Indians and the whites would have
12 the use of the lake and that led to an immediate
13 disagreement.

14 The one thing it does seem to show is that
15 General Simpson did not understand that a line across the
16 lake necessarily conveyed either an exclusive right to
17 navigate, let alone land underneath the water.

18 MR. GIVENS: But then, Your Honor, it went on to
19 say you will still have under the -- if you take this
20 agreement, you will still have the southern part of the
21 lake, I think it said the lower part of the lake and the
22 St. Joseph River, you would still have.

23 QUESTION: That may be, because you would get it
24 by the agreement and the agreement in fact had not been
25 ratified by the time of statehood. I mean, I know what he

1 said but its significance for this case, it seems to be
2 equivocal.

3 MR. GIVENS: And at statehood what, which is the
4 final one, or actually just prior to statehood the people
5 of Idaho ratified the Idaho constitution which disclaimed
6 any ownership or any jurisdiction over Indian lands until
7 that title is extinguished by Congress, so the title that
8 had been the ownership interest that Congress knew of that
9 had been established by the '73, initially by the 73
10 executive order, none of the Coeur d'Alene country had
11 been extinguished, not just --

12 QUESTION: All right, so you're assuming that
13 Indian lands in the Idaho Statehood Act referred to lands
14 as defined by the 19 -- by the 1873 executive order and I
15 don't -- I don't know why we necessarily should make that
16 assumption.

17 MR. GIVENS: Well, one reason to make that
18 assumption, Your Honor, is the 1887 agreement had a very
19 unusual clause in it, the reports from the negotiators
20 explained it was so unusual that the tribe insisted that
21 the provision be put in that the land could never be sold
22 or otherwise disposed of without the consent of the tribe,
23 any part of the reservation.

24 QUESTION: That was in which agreement; I'm
25 sorry?

1 MR. GIVENS: Pardon?

2 QUESTION: Which agreement was that in?

3 MR. GIVENS: '87. Article five of the '87
4 agreement, which is equivalent of fee.

5 QUESTION: Okay, but that -- and once again
6 that agreement had not been ratified at the time of
7 statehood; is that correct?

8 MR. GIVENS: It was not ratified at the time of
9 statehood but what happened with that disclaimer act is
10 the disclaimer act put all of this on hold. It pushed the
11 hold button. It said the United States still has
12 ownership and complete jurisdiction, absolute jurisdiction
13 is the words out of the --

14 QUESTION: Well, but that took place in 1887 and
15 1890 Idaho was admitted to the union and a subsequent
16 Congress can do things differently than an earlier
17 Congress.

18 MR. GIVENS: Certainly they can, but this is
19 what Idaho did to itself. Idaho itself adopts its
20 constitution and says we disclaim it, we don't have any
21 jurisdiction over it.

22 QUESTION: Yeah, but the question is what are
23 they disclaiming? Justice Souter asked you a few minutes
24 ago how do we know that what was defined in the 1873
25 reservation was what Idaho disclaimed in its 1890

1 constitution?

2 MR. GIVENS: We know because, also because this
3 '87 agreement specifically refers to the reservation as
4 Indian lands which is the same word used in the Idaho
5 disclaimer.

6 QUESTION: Thank you, Mr. Givens. Mr. Frederick,
7 we'll hear -- did United States have statutory authority
8 to bring this action, Mr. Frederick?

9 ORAL ARGUMENT OF DAVID C. FREDERICK, ESQ.

10 ON BEHALF OF RESPONDENT UNITED STATES

11 MR. FREDERICK: Yes, we did.

12 QUESTION: What is it?

13 MR. FREDERICK: Well, the statutory authority
14 would have been under quiet title principles. This -- the
15 purpose of this action was to quiet title in the lands.

16 QUESTION: So the right to quiet title in lands
17 which the government claims an interest.

18 MR. FREDERICK: That's correct, Mr. Chief
19 Justice.

20 QUESTION: Mr. Frederick, can I ask you the
21 question that was asked of Mr. Strack, why does it matter
22 to the Indians, they don't want people to have to wear
23 life jackets, is that -- must be something more than that.

24 MR. FREDERICK: There certainly are very serious
25 issues at stake here. Tribal ownership of the souther --

1 tribal ownership of the southern third of Lake Coeur
2 d'Alene implicates such issues as the extent to which the
3 tribe can have a role in anti-pollution measures for the
4 lake, what consequences would flow from pollution of
5 tribally owned lands, as well as to the extent to which
6 the tribe could regulate non-Indian uses on the southern
7 third of the lake.

8 QUESTION: Could the tribe engage in dredging
9 activities that would affect either the water quality or
10 the level of the portion of the lake that is not within
11 the tribe's jurisdiction even under your theory?

12 MR. FREDERICK: Well, it would have to work with
13 the Corps of Engineers which would have paramount
14 authority under various laws, but yes, that would be one
15 of the questions.

16 QUESTION: Why does the United States have
17 paramount authority under various laws?

18 MR. FREDERICK: Well under the Rivers and
19 Harbors Act the Corps of Engineers has control over
20 navigable waterways.

21 QUESTION: Whether the State or the tribe?

22 MR. FREDERICK: That's correct. That's correct.
23 But from the United States' point of view one of the
24 reasons why this case is so important is because it
25 involves the good faith of the United States. In 1891

1 when Congress ratified this statute it ratified
2 understandings that had been reached between United States
3 negotiators and it is unthinkable that Congress under the
4 equal footing doctrine would have conveyed the submerged
5 lands to all of the lake while simultaneously negotiating
6 to ratify an agreement that would convey the southern
7 third to the tribe.

8 QUESTION: You know, there's certainly something
9 to what your say, but that just totally disparages the
10 equal footing doctrine as if it's of no consequence and it
11 seems to me it's equally possible that Congress may have
12 been at varying states of mind in varying years.

13 MR. FREDERICK: Mr. Chief Justice, here the
14 negotiating history makes quite clear on page 183.

15 QUESTION: Yeah, but the idea that every member
16 of Congress knew that negotiating history when they voted
17 to admit Idaho as a state doesn't make any sense at all.

18 MR. FREDERICK: The Statehood Disclaimer Act,
19 Mr. Chief Justice, disclaims --

20 QUESTION: The ninth circuit didn't rely on that
21 at all.

22 MR. FREDERICK: I recognize that, but what it
23 does show is Congress' intent to ratify the Constitution
24 disclaiming that the State would not have any interest in
25 lands owned or held by the United States -- held by the

1 tribe until the United States extinguished title.

2 QUESTION: We don't know that the reference in
3 the Statehood Act was to the same lands as in the 1873
4 reservation.

5 MR. FREDERICK: It was well-known, Mr. Chief
6 Justice.

7 QUESTION: Well known to whom?

8 MR. FREDERICK: To everyone who was involved in
9 the negotiations and the dealings between the United
10 States and the tribe.

11 QUESTION: Well, but that doesn't mean that
12 every member of Congress, and that's the question here,
13 what did Congress mean when it admitted Idaho to the
14 union?

15 MR. FREDERICK: In 1889, Mr. Chief Justice,
16 Congress passed a law that authorized negotiations for
17 cessions of the Coeur d'Alene reservation by the tribe as
18 such tribe shall consent to sell.

19 QUESTION: And it was never ratified.

20 MR. FREDERICK: It was ratified six months after
21 the Statehood Act.

22 QUESTION: Yes, but that's too late under the
23 equal footing doctrine.

24 MR. FREDERICK: The question is whether Congress
25 had manifested its intent to defeat State title and under

1 Alaska, the test is whether Congress intended to retain
2 the executive reservation and knew that reservation
3 contained submerged lands.

4 QUESTION: How do you manifest your consent
5 when, by a subsequent act, you're relying on the
6 negotiations and the negotiations are not a manifestation
7 of consent? You need something before the Statehood Act
8 that shows the consent of Congress.

9 MR. FREDERICK: The '89 Act does that by showing
10 that Congress recognized the present reservation which was
11 the reservation embraced within the 1873 executive order
12 and the '86 Act which authorized the negotiations for the
13 lands outside the present reservation.

14 QUESTION: They don't necessarily show that they
15 recognize the kind of title that could not be defeated by
16 a subsequent creation of a state. They just show that the
17 Indians had this as their reservation.

18 MR. FREDERICK: As the executive had defined it,
19 Justice Scalia, and that's the key point here. The State
20 has conceded that the executive order reservation is what
21 it is and those boundaries that were defined in the
22 geological survey had angles drawn in the lake itself,
23 it's simply not tenable to suggest that when the lines are
24 bent and a point is drawn in the lake and that the line
25 crosses the lake that the lands underneath those navigable

1 waters are not also included.

2 QUESTION: Well, hy is that so when we have said
3 expressly in Montana and in Utah that the fact that a lake
4 is included within the boundaries of the reservation does
5 not itself mean that the submerged lands are also within
6 the reservation? We've been very clear on that in Alaska
7 and Alaska repeated that.

8 MR. FREDERICK: In Alaska, however, and the
9 reason why this is closer to Alaska than it is to Utah and
10 to Montana is that the line actually was drawn on the
11 submerged lands as it was in Alaska where the line was
12 drawn out in the coastal waterway area. In Montana the
13 reservation simply crossed a river, lines crossed the
14 river and there was no survey in Montana that this Court
15 discusses that would show acreage as being included.

16 In fact, Montana is distinguishable there
17 because the rights that were given by the treaty of 1868
18 only were residential rights.

19 QUESTION: Well, how can you tell that this
20 particular reservation the line was drawn across the
21 submerged lands? It could just as easily have referred to
22 the navigable waters.

23 MR. FREDERICK: Because the map and the
24 geological survey say so. If I could direct the court's
25 attention to two maps, the first is on page 135 of the

1 joint appendix and in -- that map was given to Congress in
2 response to the Senate resolution asking specifically does
3 the reservation include the navigable waters.

4 QUESTION: Yes, but that's -- I just looked at
5 that because it was decided and I can't find a word there,
6 of course they get the navigable waters. That's why I
7 wanted to ask and Mr. Strack said that the fact that they
8 are given navigable waters means that they can go and fish
9 on the lake, it doesn't mean they have a right to the
10 submerged lands, that's what I took him as saying. Now,
11 that, therefore that to me is an important question to me
12 that I'm asking. What reason is there for thinking that
13 if they gave them 42 documents, a hundred documents, a
14 million documents, say you have navigable waters, what
15 reason is there for thinking that that includes submerged
16 lands?

17 MR. FREDERICK: Two reasons, first the executive
18 enforced anti-liquor prohibitions on Indian country and as
19 this court decided in Bates versus Clark in 1877, Indian
20 country for purposes of that law was defined until tribal
21 ownership was extinguished. The executive treated that
22 land on the lake as tribal land for enforcing the Indian
23 country prohibitions on liquor. Secondly --

24 QUESTION: I'm sorry, that doesn't get me
25 underneath the water unless they're wearing diving

1 helmets.

2 MR. FREDERICK: No, it does get you under the
3 water because the enforcement was not occurring on that
4 sliver of the lake that was not within the reservation.
5 Moreover, the Senate said there are problems with trespass
6 on the lake by whites not authorized to be within the
7 reservation and the concept of trespass is traditionally
8 thought of as ownership of the property.

9 QUESTION: Well, was the -- were they snorkeling
10 on the submerged lands? I mean surely they were talking
11 about trespass on the water of the lake.

12 MR. FREDERICK: Yes, and the question, Mr. Chief
13 Justice, is who owns the lake and in 1889 when General
14 Simpson negotiated with the tribe they drew the line from
15 one part directly across the lake to a different part
16 directly across the lake. That map which is set out at
17 page 202 of the joint appendix --

18 QUESTION: Let me try it once more because I was
19 thinking my answer when I asked it would be nobody has
20 ever doubted that if you give navigable lands to the
21 Indian tribe you're giving them the submerged land, I mean
22 nobody has ever tried to drive a wedge between navigable
23 waters and submerged land, but that wasn't the answer I
24 got. I got the answer yes, they're totally different. So
25 this case has been around for some time and I guess by now

1 you've thought of what's the response to that and that's
2 what I'm trying to get.

3 MR. FREDERICK: The submerged lands were
4 important to the tribe for a number of different reasons.
5 Unlike the Crow tribe in Montana, this tribe depended on
6 water resources and they recognized the value of submerged
7 lands even before the 1873 executive order when they made
8 an agreement with a man named Post to convey the river
9 channels which can be nothing but submerged lands for the
10 purpose of Post building a mill on that site. This tribe
11 harvested water potatoes, it built fishing weirs that were
12 affixed to the submerged lands of the lake and the
13 associated waterways and the executive knew that.

14 When they negotiated for the land, Chief Seltice
15 insisted that the line be drawn in such a way that the
16 tribe would understand what was theirs. And General
17 Simpson in his response on page 183 of the joint appendix
18 says quite clearly after this agreement when the line is
19 redrawn you shall have the lower part of the lake. That
20 could not be clearer that the executive understood that
21 the submerged lands south of where the line was to be
22 drawn were to be owned by the tribe.

23 So the question then becomes this is in a sense
24 an amalgam of Alaska and Utah lands because had this
25 occurred before statehood this would have been a

1 conveyance case and the question would have been what did
2 Congress intend by the conveyance. And I would direct the
3 court to the 1987 agreement which we have set forth in the
4 --

5 QUESTION: 1887.

6 MR. FREDERICK: 1887 agreement. On page 93 the
7 language here is quite clear. It says, quote, it is
8 agreed that the Coeur d'Alene reservation shall be held
9 forever as Indian land and as homes for the Coeur d'Alene
10 Indians. And then skipping down a few lines, and no part
11 of said reservation shall ever be sold, occupied, open to
12 white settlement or otherwise disposed of without the
13 consent of the Indians residing on said reservation.

14 QUESTION: And that was ratified in 1891 after
15 Idaho was already a State.

16 MR. FREDERICK: That's correct, Justice Scalia,
17 but --

18 QUESTION: So I mean, that's a lovely agreement
19 but it's not an agreement by Congress.

20 MR. FREDERICK: Justice Scalia, in the Alaska
21 case the executive had set apart certain lands for a
22 wildlife refuge which had not been finalized prior to
23 Alaska statehood, but this court held that that executive
24 reservation because Congress understood that it included
25 submerged lands and was to meet the purposes behind the

1 reservation defeated the State --

2 QUESTION: There you had an actual reservation
3 of jurisdiction on the part of the United States that was
4 not -- not present here in the act.

5 MR. FREDERICK: To the contrary, Mr. Chief
6 Justice. Here the 1873 executive order set apart the
7 reservation.

8 QUESTION: I mean in the Statehood Act.

9 MR. FREDERICK: And in this case the disclaimer
10 clause says until the United States extinguishes title to
11 lands owned or held by Indians, the State of Idaho will
12 disclaim all right and title to that land. The executive
13 order reservation boundaries were well-known well before
14 statehood and --

15 QUESTION: What do you make the argument that
16 the reference to title doesn't cover this because
17 submerged lands really is an incident of sovereignty, it
18 is jurisdictional rather than proprietary.

19 MR. FREDERICK: It is proprietary in the sense
20 of ownership, Justice Souter. The fact that the State may
21 have some regulatory interest even over the southern third
22 of the lake under even our theory because under the
23 Mescalero Apache Indian case the State might still have a
24 regulatory role, given a range of factors that would be
25 involved in even if the tribe owns the southern third.

1 But the important point is that we do know that
2 it included submerged lands because the Post, the
3 Frederick Post patent expressly included river channels
4 which is submerged lands when they drew the Harrison
5 cession in 1894. At first they started it, it meandered
6 to the coast but because the town of Harrison wanted to
7 build docks and wharfs, they redraw the line at a right
8 angle in the middle of the lake so that the town of
9 Harrison could build out that wharfage on to the submerged
10 lands of the lake. So in this case the boundary lines are
11 quite clear that the parties understood submerged lands
12 were at issue and they drew the lines accordingly.

13 QUESTION: The language in the Statehood Act
14 itself which through cross-reference to the understanding
15 would be taken to have reserved the submerged lands for
16 the Indian tribes.

17 MR. FREDERICK: No, the language that is the
18 disclaimer clause that we have set out and I can direct
19 the court to that language which we have put in the joint
20 appendix, it's on page -- sorry, that language is on page
21 371 of the joint appendix and it provides as I have said,
22 but I would point out that at this time Idaho had a number
23 of Indian tribes that were resident there and so it would
24 be unusual for a State and its constitution to single out
25 a particular tribe when there are multiple tribes, when

1 the purpose of this disclaimer clause was to emphasize
2 that the State of Idaho would renounce and forever
3 disclaim all right and title to the unappropriated public
4 lands that were owned by the United States until such
5 title had been extinguished by the United States.

6 QUESTION: May I just ask this question and be
7 sure I have your theory. I don't see how an Idaho
8 disclaimer can be the ratification by Congress that is
9 necessary here. So you're actually relying on the
10 Statehood Act itself as a congressional act that did the
11 job despite the fact the ninth circuit did not?

12 MR. FREDERICK: The State -- no, two things,
13 Justice Stevens. Our theory depends upon the court
14 recognizing the executive reservation through statehood
15 which the '89 Act is clear --

16 QUESTION: But would it be enough if Congress
17 knew all about it but did nothing but perfect and clear --
18 every Cong -- every congressperson was aware of the
19 executive's view of the reservation, would that have been
20 enough?

21 MR. FREDERICK: That would have raised an Alaska
22 question and I think that that would have been enough in
23 light of the executive having set forth the boundary.
24 What the Statehood Act does for us is that it shows what
25 Congress intended because Congress specifically adopted

1 the Idaho constitution in the Statehood Act. So that is
2 also an expression of congressional intent that Congress
3 ratified and adopted the Idaho constitution and the
4 Statehood Act which contained the disclaimer.

5 QUESTION: How does it do it? How -- what's the
6 language that Congress passes that incorporates the
7 provision which you read to me which wasn't from the
8 Congressional resolution but was from the Idaho
9 constitution which Idaho says doesn't mean this now.

10 MR. FREDERICK: It's in the Idaho admission
11 bill.

12 QUESTION: What does it say? I mean, is there
13 --

14 MR. FREDERICK: Well, it says section one, the
15 State of Idaho is hereby declared to be a State and that
16 the constitution which the people of Idaho have formed or
17 themselves be in the same is hereby accepted, ratified,
18 and confirmed. So Congress in section one of the Idaho
19 Admission Act ratified the Idaho constitution which
20 contained the disclaimer clause language.

21 QUESTION: Mr. Frederick, can I come back to
22 this pollution thing? Part of Lake Coeur d'Alene has, I
23 understand, is badly polluted from mine tailings, some
24 such thing; is that stuff on the portion that's at issue
25 here or is it on another portion?

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1 MR. FREDERICK: It's throughout the lake,
2 although the principal portion of the polluted part is on
3 the northern part of the lake. The southern part at least
4 I'm reliably informed, and this is matter that's outside
5 of the record, is not as polluted, although it is subject
6 to pollution problems and issues.

7 I would like to just make a couple of points in
8 conclusion and that is the Idaho issue in terms of
9 submerged lands is also implicated by the 1888 railroad
10 statute which Congress passed and that passage which came
11 after the Senate resolution asking about the navigable
12 waters included a right of way that crossed across Lake
13 Coeur d'Alene to a point on the lake itself and requires
14 that the secretary provide compensation to the tribe for
15 that easement and it further provided that no rights for
16 the railroad shall accrue unless and until they obtained
17 the consent of the tribe.

18 So read together and this court's cases makes
19 very clear two overarching propositions, that these Indian
20 statutes should be read as a series and that doubts should
21 be construed in favor of the tribe suggest that Congress
22 did understand that the submerged lands were at stake,
23 that the tribe had control over those submerged lands and
24 that the United States would not take them without the
25 consent of the tribe. If there are no further questions.

1 QUESTION: Thank you, Mr. Frederick. Mr. Strack,
2 you have four minutes remaining.

3 REBUTTAL ARGUMENT OF STEVEN W. STRACK, ESQ.

4 ON BEHALF OF THE PETITIONER

5 MR. STRACK: On this question of whether or not
6 there's a difference between beds and navigable waters, I
7 think the court has made that very clear in the Alaska
8 decision where the court looked to purposes that required
9 ownership of the beds themselves; for example, the need to
10 own the bed to preserve the oil deposits.

11 QUESTION: We've just heard about wharfs, about
12 harvesting potatoes, about grants for the mill, does that
13 indicate the sort of purposes that we thought were
14 important in Alaska?

15 MR. STRACK: Looking back at the 1889 Act I
16 don't think any of those purposes are evident on the face
17 of the 1889 Act. If there was a purpose and the only
18 purpose they have identified is fishing, and that itself
19 does not require ownership of the beds of the navigable
20 waters themselves unless they're fishing methods for some
21 reason required ownership of the bed like a fishing weir,
22 but we don't see any evidence that they were doing that in
23 1889.

24 So again I think we need to look at the purposes
25 here and see whether or not those require ownership of

1 navigable waters, ownership of the beds of navigable
2 waters as opposed to the waters themselves.

3 I'd like to go back too to the question
4 practical effect because I think it obviously is a concern
5 here. And I think it's important to note that all of the
6 lands along the shore of the lake are owned by non-Indians
7 and that's been true since 1910 when the reservation was
8 allotted.

9 Those lands, those people have riparian rights
10 which they look to the State to protect and define. Many
11 of those people have encroachments on the lake and that's
12 where our ownership of the beds comes into play because we
13 regulate those encroachments so that they do not go out
14 far enough to impair navigation and other uses of the
15 lake.

16 So all of these people along the lake, now their
17 riparian rights are called into question because the State
18 no longer owns the beds of the lake according to the
19 decree and so we don't know what the effect of that would
20 be.

21 On the issue of pollution it works both ways, so
22 the tribe has an interest in protecting the lake from
23 pollution and the State has an equal interest, if not more
24 so, because we own the remainder of the lake, and when you
25 split a system like this in two it becomes very hard to

1 regulate that in a consistent manner. For example --

2 QUESTION: As far as encroachments on the lake,
3 doesn't the Corps of Engineers have authority no matter
4 whether the tribe owns the submerged lands or the State of
5 Idaho? Doesn't the Corps get to say what can encroach out
6 in the navigable water?

7 MR. STRACK: Justice O'Connor, for the most part
8 the Corps is not involved in these kinds of encroachments
9 unless there's dredging and filling.

10 QUESTION: Do you dispute the fact that the
11 Corps does have jurisdiction to determine what
12 encroachments are authorized in navigable water?

13 MR. STRACK: Where there's a fail interest
14 involved, Justice O'Connor they certainly could come in
15 and preempt, but it's my experience that we regulate all
16 those encroachments and I'm not aware of the Corps ever
17 being involved in those kinds of decisions.

18 QUESTION: If the State perhaps regulates more
19 stringently than the Corps would care to, that's quite
20 possible.

21 MR. STRACK: That is quite possible because of
22 the statute that we have in place protecting the lake as a
23 public resource for recreation and other public uses.

24 And so when we have a split system like this,
25 especially on issues such as fisheries, if the tribe was

1 to introduce new species of fish that was not genetically
2 compatible with the fisheries that we have in the
3 remainder of the lake, we could have some real problems
4 there. So there's tremendous practical effects that
5 result not only from tribal ownership but tribal ownership
6 of a small portion of the greater lake.

7 On the issue of -- Mr. Givens mentioned the
8 acreage that included in the report, the acreage that
9 included navigable waters but it's also important to look
10 at the acreage of the cession that was reported. According
11 to the United States' exit report at page 237 the acreage
12 that was ceded in 1889 was 243,000 acres and that included
13 37,000 acres of the lake. But the House report 1109
14 reported that acreage as 185,000 acres. That's found at
15 page 315 of the joint appendix. So obviously Congress did
16 not view this cession as including the lake bed itself.
17 They did not view themselves as having purchased that from
18 the lake.

19 QUESTION: I SEE.

20 Chief Justice REHNQUIST: Thank you, Mr. Strack.
21 The case is submitted.

22 (Whereupon, at 11:03 a.m., the case in the
23 above-entitled matter was submitted.)

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